

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 March 2007

CASE NO.: 2007-LDA-23

OWCP NO.: 02-140404

IN THE MATTER OF

J. S.,
Claimant

v.

SERVICE EMPLOYEES INTERNATIONAL,
Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
Carrier

APPEARANCES:

Gary Pitts, Esq.,
On behalf of Claimant

John L. Schouest, Esq.,
Brian E. White, Esq.,
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER GRANTING LIMITED BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, (2000) and its extension, the Defense Base Act, 42 U.S.C. 1651 *et seq.* (DBA) brought by J.S. (Claimant) against Service Employees International (Employer) and Insurance Company of the State of Pennsylvania (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on January 18, 2007 in Houston, Texas.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced 11 exhibits which were admitted, including various DOL forms (LS-202, 203, 207, 18), Claimant's medical records, Employer injury report, Claimant's earnings in 2004 with Employer, Claimant's 2004 W-2, and Employer's discovery responses.¹ Employer called vocational expert, William L. Quintanilla and introduced 18 exhibits which were admitted including various DOL forms (LS-18, 202, 203, 206, 207), employment agreement, Claimant's personnel file including pre-employment physical, wage information, Social Security Administrative Decision, Claimant's medical records, vocational assessment of Mr. Quintanilla, personnel records from Village of Ruidoso, Claimant's answers to interrogatories and responses to Employer's request for production of documents, Claimant's federal income tax and social security earnings records.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant was injured on September 27, 2004 on which date he was employed as an employee of Employer.
2. Claimant was injured in a zone of special danger. Baghdad, Iraq. (Tr. 6).
3. Employer filed notices of controversion on February 23, 2005 and September 13, 2005.
4. An informal conference was held on August 18, 2006.
5. Employer paid Claimant medical benefits.
6. Claimant reached maximum medical improvement on December 27, 2004.

¹ References to the transcript and exhibits are as follows: trial transcript- Tr.____; Claimant's exhibits-CX-____; p.____; Employer exhibits-EX-____; p.____; Administrative Law Judge exhibits-ALJX-____; p.____.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Causation;
2. Nature and extent of injury;
3. Entitlement to temporary total disability benefits;
4. Permanent loss of wage earning capacity;
5. Average weekly wage;
6. Section 8 (f): whether Claimant's injury aggravated a pre-existing condition; if so whether Employer is entitled to Section 8 (f) relief (Tr. 7);
7. Penalties and interest; and
8. Attorney fees.

III. STATEMENT OF THE CASE

A. Chronology:

As noted below Claimant took and passed a pre-employment medical exam on August 31, 2004. (EX-3, p. 1). Claimant was treated initially for a September 27, 2004 back and right hip injury on October 4, 2004 by an Employer medic. This was followed by additional trips to the medic on October 11, 12, 2004. (Id. at 14-17). Claimant's employment was terminated October 15, 2004 by which time he had grossed \$6,506.24. (EX-4). In 2004, prior to his employment with Employer, Claimant had an adjusted gross income of \$6,600.00.

On March 17, 2005 Claimant went to the Hoerster Clinics in Kingland, Texas where he was treated for a stabbing pain in the right posterior hip if he stood or walked for any length of time. On exam Claimant demonstrated marked tenderness over the mid-lumbar and sacrioliac areas. X-rays of pelvis and lumbar region were essentially normal except at L5- S1 which showed posterior subluxation and disc space narrowing. (EX-14, p. 9). On the next visit back x-

rays were read as showing diffuse lumbar degeneration which was confirmed by a lumbar MRI of April 7, 2005. (Id. at 12, 13).

On April 22, 2005 Claimant was referred to Westlake Orthopedics in Austin, Texas, where he was examined and found to have retrolisthesis at L5-S1 and foraminal stenosis L5-S1 on the right with evidence of nerve irritation which correlated with the MRI results. Dr. Spann recommended physical therapy and possible use of lumbar epidural steroid injections. (Id. at 17). Thereafter, he was seen by Dr. Anand Joshi of the Spine Diagnostic and Treatment Center in Austin on June 24, 2005 who ordered epidural steroid injections, comprehensive metabolic count, drug screen, urinalysis, blood count, and needle electromyography and indicated on June 24, 2005 that Claimant was unable to work. (Id. at 26). On July 5, 2005, Claimant underwent a bone scan which was negative. (Id. at 36). However, flexion and extension x-rays of the same date showed grade 1 degenerative anterolisthesis and degenerative disc disease at L5-S1. (Id. at 37). On July 29, 2005, Claimant underwent a psychological evaluation which showed a depressive disorder and a chronic pain disorder related to psychological factors. (Id. at 61-68). A lumbar CT performed on August 9, 2005 showed degenerative grade 1 listhesis at L4-L5 and right foraminal encroachment at L5-S1. (Id. at 71).

On August 10, and September 7, 22, 27, October 14, 20, 2005, Claimant saw Dr. Joshi and underwent epidural injections. (Id. at 82-90, 107-137). This was followed by office visits and physical therapy November and December, 2005 and L2-L4 facet blocks on December 26, 2005. (Id. at 145-185). Office visits and therapy continue in 2006 (January 20, February 16, March 7, May 22, June 19, July 27, December 4. (Id. at 186, 211-215, 227-231).

On March 7, 2006, Claimant received notice from the Social Security Administration, Office of Hearings and Appeals that based upon a severe impairment of cervical and lumbar degenerative disc disease which restricted Claimant to light work (paragraph 5 of the Findings of Fact and Conclusions of Law) and considering MRIs of September, 2002, and April, 2005, Claimant's symptoms, inability unable to perform his past relevant work, advanced age, high school education, the lack of transferable work skills, there were no job existing in significant numbers in the national economy which he could perform and thus he was disabled pursuant to medical vocational rule 20 C.F.R. §§ 404,1520(g) and 416.920 (g) (EX-7).

On March 9, 2006, Claimant was evaluated by orthopedist, Dr. Gary N. Pamplin. In response to questions from Employer, Dr. Pamplin stated: (1) Based upon his assessment of the facts, medical probability and the biology of healing tissue, it was reasonable to conclude that Claimant's lumbar spine sprain or strain would typically heal within three months or by December 27, 2004; (2) after that date complaints and conditions flowed from the natural and progressive course of pre-existing disease of life (degenerative spondylolisthesis-retrolisthesis of L5-S1; (3) current medical services are directed to the effects naturally flowing from pre-existing disease of lumbar spine; (4) no further care is reasonable, medically necessary, or causally related to the September 27, 2004 injury; (5) Claimant reached maximum medical improvement on December 27, 2004; (6) there is no validation that Claimant's pre-existing condition was enhanced or accelerated by the September 27, 2004 injury. In reaching his conclusion, Dr. Pamplin admittedly did not see all of Claimant's medical records allegedly because Claimant refused to produce them. (EX-14, pp. 199-209). Dr. Pamplin discounted the psychological

evaluation by Dr. Zeigler because in his opinion Dr. Pamplin allegedly did not validate that Claimant's depressive disorder flowed naturally from the September 27, 2004 injury.

On Jul 25, 2006, Claimant underwent a functional capacity evaluation which showed Claimant functioning safely at the sedentary level lifting occasionally 9 lbs, frequently 4 lbs, and constantly 2 lbs. (Id at 216-226).

B. Claimant's Testimony

Claimant is a 61 year old male with a residence over the past 4 years in Tow, Texas which is located about 80 miles northeast of Austin, Texas. (Tr. 24). Claimant has a GED with past work as a construction steel rigger, painter and carpenter. (Tr. 25, 26). Prior to his employment by Employer as a carpenter Claimant on August 31, 2004 took and passed a medical exam and was assigned framing work on Baghdad, Iraq. (EX-3, p. 2). On September 2, 2004 Claimant signed an employment contract with Employer and flew out of Houston to Dubai on September 15, 2004. (EX-1, EX-2, p. 11).² In Baghdad Claimant volunteered to work 14 hours per day, 7 days a week. Claimant worked in Iraq for about one month or until October 15, 2004 (Tr. 35). During this period Claimant worked in one of Saddam's former palaces that had been bombed while living in a tent and bombed out guard tower in filthy conditions enduring temperatures ranging from 120 to 130 degrees without the benefit of any air conditioning. (Tr. 45). Claimant apparently had a minor injury from a car bomb. (Tr. 46).

Claimant testified that on September 27, 2004, while carrying a sheet of 3/4inch plywood down a hallway he turned to go into his work area and experienced a popping and cracking sensation and intense back pain whereupon he dropped the plywood (Tr.28). Despite the pain Claimant at the urging of a fellow worker continued working. On October 4, 2004 Claimant saw an Employer medic who in turn gave Claimant sleeping pills, Bengay, and Flexeril. When the pain worsened Claimant eventually saw a doctor who told him to return home and stay off his leg for 30 days after which if his condition did not resolve he was to contact Employer and see a physician. (Tr. 29, 30).

Claimant did as directed, but initially received little help from Employer. After some persistence Claimant convinced Employer to provide medical treatment. However, despite medical treatment Claimant's condition has not improved. Currently Claimant has to alternate between sitting and standing. Prior to the injury Claimant could work all day without limitation (Tr. 31, 32).

Following the injury he has not worked but rather has remained at home doing dishes and cooking and taking pain medication. (Tr. 33).³

² It took Claimant about two weeks to complete the internal processing before he could fly out from Houston. (Tr. 34, 35).

³ Claimant's medications include Tramadol, Vicodin and Methadone. Currently Claimant takes 4 tramadol unless he has to drive. (Tr. 48).

On cross Claimant admitted having a degenerative back condition and a neck injury prior to his employment with Employer.⁴ However, this condition allegedly never prevented Claimant from working and making “pretty good money.” (Tr. 37-39). Claimant also admitted filing for Social Security disability benefits in 2002, but being turned down because he was able to work. (Tr. 40). Subsequently, Claimant admitted receiving Social Security benefits of \$438.00 per month. (EX-8, p. 49; Tr. 43).⁵ Claimant testified he can stand for 10 to 15 minutes after which he has to sit. (Tr. 48).

C. Testimony of Vocational Consultant, William Quintanilla

Vocational rehabilitation counselor, Mr. Quintanilla testified that he did a vocational assessment of Claimant on January 11, 2007 which included an interview of Claimant, plus a review of Claimant’s medical record, an analysis of Claimant’s social, military, and educational and work background. This was followed by two labor market surveys. (EX-15; Tr. 55). Mr. Quintanilla’s first survey identified medium level carpenter jobs of trim carpenter in San Marcos, Texas paying \$ 12.00; carpenter at Human Resources Management Department in Austin, Texas paying \$14.76 per hour; and carpenter at Hays Dream Homes in Horseshoe Bay, Texas paying \$13.00 too \$18.00 per hour . The second survey identified the following sedentary positions: front desk security in Round Rock, Texas paying \$8.00 per hour; dispatch clerk in Dripping Springs, Texas paying \$8.00 to \$11.00 per hour; telemarketer (address unknown) paying \$10.00 per hour; and another telemarketer in Round Rock, Texas paying \$12.00 per hour. (EX-15; Tr. 57). All of these positions were full time jobs with the first survey assuming Claimant had only a resolved lumbar sprain while the second survey assumes permanent injuries and limitations based upon a functional capacity evaluation dated July 25, 2006. (EX-14, pp. 216-226).

On cross Mr. Quintanilla admitted that Round Rock and Dripping Springs were about 80 miles from Claimant’s abode. Further, Claimant had no background in sales or telemarketing. (Tr. 58, 59).

IV. DISCUSSION

A. Contention of Parties

Employer contends: (1) if Claimant was injured while in Iraq this injury was nothing more than a temporary aggravation of a pre-existing condition which resolved by December 27, 2004; (2) alternatively if Claimant is found to continue suffering from a work related disability,

⁴ In September, 2002, Claimant was treated conservatively for a minor neck and back injury. (EX-14, pp.1, 2).

⁵ Claimant filed for disability insurance and supplemental security income benefits in January, 2004. (Tr. 43).

Employer carrier is entitled to Section 8 (f) relief. Claimant on the other hand contends there are only two unresolved issues namely loss of wage earning capacity and average weekly wage.

B. Credibility of Parties

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

Employer attacks Claimant's credibility claiming Claimant denied any pre-existing injury while admitting to an Employer medic on October 12, 2004 that he had a two month history of back pain and was not able to recall the particular instance wherein he allegedly injured his back (EX-8, pp.35, 39, EX-14, pp 1, 6). Claimant also admitted filing for Social Security disability based upon a 2002 back and neck injury. (EX-7).

Regarding Claimant's credibility, I agree with Employer that it is suspect not only for the reasons cited by Employer but because of Claimant's limited employment prior to being hired by Employer. While Claimant asserted he had no work limitation prior to his September 27, 2004 injury and made a good income, the records shows Claimant making only \$3,187.75 from the Village of Ruidoso in New Mexico in 2002 where he worked as a park maintenance worker from February 14, 2002 to April 26, 2002 at \$8.20 per hour; (EX-16). During this employment Claimant filed a worker's compensation claim alleging a head and neck injury collecting litter and getting in and out of vehicles. (Id. at 23). In 2003, Claimant reported earnings of only \$8,558.00. (EX-4, p. 3).

In 2004, Claimant reported earnings of \$19, 735 of which \$6,506.24 were paid by Employer.

C. Causation

In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial

purpose. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998)(quoting *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991). Ordinarily the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. § 556(d) (2002). By express statute, however, the Act presumes a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary. 33 U.S.C. § 920(a) (2003). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. 556(d) (2002); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999).

Section 20 provides that in any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary: (a) that the claim comes within the provisions of this Act.” 33 U.S.C. § 920(a). To establish a prima facie claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O’Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this prima facie case is established, a presumption is created under Section 20(a) that the employee’s injury or death arose out of employment. *Hunter*, 227 F.3d at 287. The mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer.” *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982). *See also* *Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer).

Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related. *Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether the employer has succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995) (failing to rebut presumption through medical evidence that claimant suffered an prior, unquantifiable hearing loss); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144-45 (1990) (finding testimony of a discredited doctor insufficient to rebut the presumption); *Dower v. General Dynamics Corp.*, 14 BRBS 324, 326-28 (1981) (finding a physician’s opinion based of a misreading of a medical table insufficient to rebut the presumption). The Fifth Circuit further elaborated:

To rebut this presumption of causation, the employer was required to present substantial evidence that the injury was not caused by the employment. When an

employer offers sufficient evidence to rebut the presumption the kind of evidence a reasonable mind might accept as adequate to support a conclusion only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also*, *Ortco Contractors, Inc., v. Charpentier*, 332 F.3d 283, 290 (5th Cir. 2003) *cert. denied* 124 S. Ct., 825 (Dec. 1, 2003) (stating that the requirement is less demanding than the preponderance of the evidence standard); *Conoco, Inc.*, 194 F.3d at 690 (stating that the hurdle is far lower than a “ruling out” standard); *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff’d* mem., 722 F.2d 747 (9th Cir. 1983) (stating that the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995) (stating that the unequivocal testimony of a physician that no relationship exists between the injury and claimant’s employment is sufficient to rebut the presumption).

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935); *Port Cooper/T Smith Stevedoring Co., v. Hunter*, 227 F.3d 285, 288 (5th Cir. 2000); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

In this case I find Claimant established a *prima facie* case of causation showing he had a back sprain which was caused by lifting and carrying plywood on the job. Employer did not rebut this presumption

D. Nature and Extent of Injury

Disability under the Act is defined as an incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment. 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement. (MMI).

The determination of when MMI is reached, so that a claimant’s disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit*

Authority, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

The Act does not provide standards to distinguish between classifications or degrees of disability. However, case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d at 1038; *P&M Crane Co., v. Hayes*, 930 F.2d at 429-30; *SGS Control Serv., v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). Claimant need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984) (emphasis added). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). In this case there is no question that Claimant cannot perform his normal welding duties with the restrictions imposed on Claimant as of November 3, 2005. Indeed, Employer had to assign Claimant light duty following his 2005 injury.

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv.*, 86 F.3d at 444; *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP, v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991) (crediting employee statement that he would have constant pain in performing another job). An employer may establish suitable alternative employment retroactively to the day when the claimant was able to return to work. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540, 542-43 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. See *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

Job availability should incorporate the answer to two questions: (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant

is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

When an employer presents several different jobs that are available to a claimant, or when a claimant has worked several different jobs, it is appropriate to average the earnings to arrive at a fair and reasonable estimate of the claimant's earning potential. *Avondale Industries, Inc., v. Pulliam*, 137 F.3d 326, 328 (5th Cir. 1998)(finding that averaging several jobs offered by an employer was appropriate because the court has no way of determining which job the claimant will obtain and the average wage reflects all those jobs that are available); *Shell Offshore Inc., v. Cafiero*, 122 F.2d 312, 318 (5th Cir. 1997)(holding that averaging was a reasonable method to calculate a claimant's post-injury earning capacity); *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 129 (5th Cir.1994)(finding that averaging salary figures to establish earning capacity was appropriate and reasonable).

In this case the parties stipulated, and I find, Claimant reached MMI on December 27, 2004. By this date, Dr. Pamplin credibly stated Claimant's sprain had healed leaving no residual impairments. While Claimant continued to have back and leg pain this was due to a pre-existing degenerative back condition for which Employer was not responsible. In so finding, I note that no other physician whether treating or non-treating indicated Claimant's back strain aggravated or accelerated his pre-existing back impairment. I do not credit Claimant assertion that his pre-existing back condition did not limit or restrict his work especially in view of the limited work he did prior to his employment with Employer and his filing for Social Security benefits. From September 27, 2004 to December 27, 2004 Claimant was clearly unable to perform his past work as a carpenter. Inasmuch as Employer did not establish suitable alternative jobs available for him during this period, I find Claimant entitled to temporary total disability.

E. Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage. 33 U.S.C. § 910(d)(1); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 407 (5th Cir. 2000), *on reh'g* 237 F.2d 409 (5th Cir. 2000). Where neither Section 10(a) nor Section 10(b) can be reasonably and fairly applied, Section 10(c) is a catch all provision for determining a claimant's earning capacity. 33 U.S.C. § 910(c); *Louisiana Insurance Guaranty Assoc., v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Wilson v. Norfolk & Western Railroad Co.*, 32 BRBS 57, 64 (1998). For traumatic injury cases, the appropriate time for determining an injured workers average weekly wage earning capacity is the time in which the event occurred that caused the injury and not the time that the injury manifested itself. *Leblanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 161 (5th Cir. 1997); *Deewert v. Stevedoring Services of*

America, 272 F.3d 1241, 1246 (9th Cir. 2001) (finding no support for the proposition that the time of the injury is when an employee stops working); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, 172 (1998). In occupational disease cases, the appropriate time for determining an injured workers average weekly wage earning capacity is when the worker becomes aware, or should have been aware, of the relationship between the employment, the disease, and the death or disability. 33 U.S.C. § 910(i).

Section 10(a) focuses on the actual wages earned by the injured worker and is applicable if the claimant has worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury. 33 U.S.C. § 910(a); *See also Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 618 (5th Cir. 2000)(stating Section 10(a) is a theoretical approximation of what a claimant could have expected to earned in the year prior to the injury); *Duncan v. Washington Metro Area Transit Authority*, 24 BRBS 133, 135-36 (1990). Once a determination is made that the injured employee worked substantially the whole year, his average weekly earnings consists of “three hundred times the average daily wage or salary for a six-a-day worker and two-hundred and sixty times the average daily wage of salary for a five day worker.” 33 U.S.C. § 910(a). If this mechanical formula distorts the claimant’s average annual earning capacity it must be disregarded. *New Thoughts Fishing Co., v. Chilton*, 118 F.2d 1028, n.3 (5th Cir. 1997); *Universal Maritime Service Corp., v. Wright*, 155 F.3d 311, 327 (4th Cir. 1998). In this case Section 10(a) does not apply because Claimant was a 7 day a week worker.

2. Section 10(b)

Where Section 10(a) is inapplicable, the application of Section 10(b) must be explored prior to the application of Section 10(c). 33 U.S.C. § 910(c); *Bunol*, 211 F.3d at 297; *Wilson*, 32 BRBS at 64. Section 10(b) applies to an injured employee who has not worked substantially the whole year, and an employee of the same class is available for comparison who has worked substantially the whole of the preceding year in the same or a neighboring place. 33 U.S.C. § 910(b). If a similar employee is available for comparison, then the average annual earnings of the injured employee consists of three hundred times the average daily wage for a six day worker, and two hundred and sixty times the average daily wage of a five day worker. *Id.* To invoke the provisions of his section, the parties must submit evidence of similarly situated employees. *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1031 (5th Cir. 1998). When the injured employee’s work is intermittent or discontinuous, or where otherwise harsh results would follow, Section 10(b) should not be applied. *Id.* at 130; *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822 (5th Cir. 1991). In this case there is no evidence of any comparable worker so Section 10 (b) cannot be applied.

3. Section 10(c)

If neither of the previously discussed sections can be applied reasonably and fairly, then a determination of a claimant’s average annual earnings pursuant to Section 10(c) is appropriate. 33 U.S.C. § 910(c); *Bunol*, 211 F.3d at 297-98; *Gatlin*, 936 F.2d at 821-22; *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218-19 (1991). Section 910(c) provides:

[S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

The judge has broad discretion in determining the annual earning capacity under Section 10(c). *James J. Flanagan Stevedores, Inc., v. Gallagher*, 219 F.3d 426 (5th Cir. 2000)(finding actions of ALJ in the context of Section 10(c) harmless in light of the discretion afforded to the ALJ); *Bunol*, 211 F.3d at 297 (stating that a litigant needs to show more than alternative methods in challenging an ALJ's determination of wage earning capacity); *Hall*, 139 F.3d at 1031 (stating that an ALJ is entitled to deference and as long as his selection of conflicting inferences is based on substantial evidence and not inconsistent with the law); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). The prime objective of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury. *Gatlin*, 936 F.2d at 823; *Cummins v. Todd Shipyards*, 12 BRBS 283, 285 (1980). The amount actually earned by the claimant is not controlling. *National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288, 1292 (9th Cir. 1979). In this context, earning capacity is the amount of earnings that a claimant would have had the potential and opportunity to earn absent the injury. *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980).

Claimant asserts that an appropriate average weekly wage should be based upon Claimant's gross earnings of \$6,508.24 divided by his 4 and 3/7 weeks of work resulting in an AWW of \$1,469.15 and a compensation rate of \$979.43 in accord with *James Zimmerman v. Service Employees International*, 2004-LHC-927 (3/25/05), affirmed BRB No. 05-0580 (2/22/06); *Vernon Patton v. Brown & Root Services*, 2005-LDA-32 (1/24/06). Employer would have me divide Claimant's annual earnings in 2004 of \$19,641.24 by 52 resulting in an AWW of \$377.71 and a compensation rate of \$251.81. Considering the nature of the work he performed I agree with Claimant that the most equitable approach is to divide his earnings while in Iraq (\$6,508.24) by the number of weeks worked (4 and 3/7 weeks) resulting in an AWW of \$1,469.15 with a corresponding compensation rate of \$979.43.

F. Medical Benefits

Section 7(a) of the Act provides that the employer shall furnish such medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require. 33 U.S.C. § 907(a). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). A claimant establishes a prima facie case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988); *Turner v. The Chesapeake and Potomac Telephone*

Co., 16 BRBS 255, 257-58 (1984). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). The employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975)(stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977).

In this case, I find Claimant entitled to medical benefits during his period of temporary total disability from September 27, 2004 to December 27, 2004.

G. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills." *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director.

H. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from September 27, 2004 to December 27, 2004 based on an average weekly wage of \$1,469.15, and a corresponding compensation rate of \$979.43.

2. Employer shall be entitled to a credit for all compensation paid to Claimant following his September 27, 2004 injury.

3. Employer shall pay Claimant for all reasonable medical care and treatment arising out of his work-related injuries which occurred during the period of his temporary total disability pursuant to Section 7(a) of the Act.

4. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. § 1961.

5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge